

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. L-12/09-651
)
 Appeal of)

INTRODUCTION

The petitioner appeals the decision by the Department for Children and Families substantiating a report that the petitioner sexually abused a child. The issues are whether the Department's decision is supported by a preponderance of the evidence and by the pertinent statutory definition of sexual abuse.

PROCEDURAL HISTORY

In July 2003 the Department received a report that M., a then-thirteen-year-old girl, had disclosed that she had been sexually abused by the petitioner in the Fall of 2002. After interviewing M and M's mother, and determining that the petitioner, on advice of counsel, was refusing to be interviewed, the Department investigator recommended that the report should be substantiated. By letter dated December 10, 2003 the Department notified the petitioner of its decision to substantiate the report as sexual abuse.

The petitioner did not appeal this decision until Spring 2009. A Commissioner's Review meeting was held on May 14, 2009. By letter dated November 10, 2009 the Department notified the petitioner that it was upholding its 2003 substantiation of sexual abuse.

The petitioner appealed this decision to the Human Services Board on December 14, 2009. At the initial telephone status conference held on January 8, 2010, the petitioner requested a continuance to try to obtain an attorney. At a second telephone status conference held on February 9, the petitioner indicated he would proceed with his appeal *pro se*, and the Department advised that it would furnish the petitioner with its written records in the case and a list of witnesses it would call at the hearing. The matter was continued to allow the petitioner to respond to the Department's filing. Another telephone status conference was set for April 13, 2010 for this purpose.

The matter was then delayed by the petitioner having moved to Arizona without initially notifying the Board or the Department. At a telephone status conference on May 17, 2010 the hearing officer granted the petitioner's request to participate in his hearing by speaker phone.

The hearing was held in Brattleboro, Vermont on June 29, 2010. The Department submitted the testimony of its investigator, M (the alleged victim), M's mother, and M's ob/gyn. The petitioner participated in the hearing and testified in his own behalf by phone from Arizona. The following findings are based on those witnesses' testimony.

FINDINGS OF FACT

1. The petitioner and M's mother were married in 1997 after living together for several years. M was her mother's child from a previous marriage, but the petitioner and M's mother had two other children of their own. Following instances of reported domestic violence, M's mother was divorced from the petitioner in 1999 or 2000. M's mother got custody, but the petitioner had weekend overnight visitation rights with all three children.

2. M's mother testified that in October 2002 M began to express reluctance to go to the petitioner's house with her siblings for scheduled weekend visitations. The second time that M requested not to go, she told her mother that the petitioner had touched her on her vagina when she was in the bathroom, and that she was afraid it would happen again.

3. M's mother confronted the petitioner with M's allegations, and the petitioner denied them. However, M's mother stopped sending M for visitations, and it does not appear that the petitioner took any legal action to contest the termination of his visitation with M.

4. At that time, M's mother was involved in an ongoing dispute with the petitioner over child support for all three of the children. She testified that even though she initially stopped sending all three of the children for visitations, she subsequently allowed M's younger half-siblings to resume their visits with the petitioner, at their request, because there was no indication that the petitioner had abused either of them. She stated that she was unemployed at the time and fearful of the loss of child support and a violent reaction by the petitioner if she either denied him visitation with the other children or reported the incident involving M. She also stated that M was upset and embarrassed by the incident, and that she thought it would be best for the other children and M if M simply never had contact with her stepfather again.

5. In July 2003 M confided the incident during a peer discussion group she was involved in that summer. The adult leaders of the group contacted M's mother and advised her

that either they or she would have to report the incident to the Department. M's mother decided to report the incident herself to the Department.

6. M's mother's testimony and demeanor at the hearing appeared sincere and credible.

7. M is now twenty. She graduated high school in 2008. She testified that she recalls that the petitioner touched her on the vagina when she was visiting him in 2002. She stated that she also recalls the details of the allegations she made to her mother, the Department, the police, and the youth group in 2003, and that she had told the truth at that time.

8. There is no indication or suggestion of any motive or gain M would have in initially making these allegations, and in continuing over the years to stand by and reiterate them. M was clearly ill at ease and reluctant to discuss the allegations at the hearing, but based on her overall demeanor, her testimony was deemed highly credible.

9. M's ob/gyn testified that M and her mother had made the same allegations at an exam she had done of M in 2008 (when M was 19), after M had become "hysterical" about undergoing a vaginal examination. This doctor testified that in her experience, which appears extensive, such reactions

are consistent with many young women who have been victims of sexual abuse in their childhoods.

10. In his brief testimony, the petitioner denied the allegations, and stated that whenever M visited his house in 2002 his "fiance" was always present. In light of, and in comparison to, the testimony and demeanor of the other witnesses, the petitioner's denial was not deemed credible. Other than the petitioner's denial there is no evidence or circumstances calling the credibility and reliability of M.'s allegations into question.

ORDER

The Department's decision substantiating the report of sexual abuse is affirmed.

REASONS

The Department is required to investigate reports of child abuse or neglect and to maintain a registry with the names and records of those who are determined to have a "substantiated" finding of abuse or neglect. 33 V.S.A. § 4915. A report is substantiated when it is "based upon accurate and reliable information that would lead a reasonable person to believe that the child has been abused or neglected." 33 V.S.A. § 4912(10).

Any person against whom a report of abuse is substantiated by DCF may appeal to the Human Services Board. In such cases the burden of proof is on the Department. 33 V.S.A. § 4916b.

The statutory sections relied upon by DCF in this matter include the following:

(2) An "abused or neglected child" means a child whose physical health, psychological growth and development or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare. An "abused or neglected child" also means a child who is sexually abused or at substantial risk of sexual abuse by any person.

. . . .

(8) "Sexual abuse" consists of any act or acts by any person involving sexual molestation or exploitation of a child including but not limited to incest, prostitution, rape, sodomy, or any lewd and lascivious conduct involving a child. Sexual abuse also includes the aiding, abetting, counseling, hiring, or procuring of a child to perform or participate in any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, depicts a sexual conduct, sexual excitement or sadomasochistic abuse involving a child.

33 V.S.A. § 4912

In this case, the petitioner does not dispute that the acts described by M., if they occurred, constituted sexual abuse by the petitioner within the meaning of the above provisions. However, as with most cases of this nature,

there can be only two individuals who will ever know with certainty what occurred. In a *de novo* hearing the Department's burden of proof is to establish the facts by a preponderance of evidence. In determining whether this burden is met, the relative credibility of the witnesses is crucial. As noted above, the hearing officer deemed M., the alleged victim in this matter, to be highly credible in her testimony regarding the alleged event. Thus, the Department's decision substantiating the report in question as one of sexual abuse must be affirmed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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